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No. 89-964

In the Supreme Court of the United States

OCTOBER TERM, 1989

RAYMOND J. MOSKAL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 2314, which prohibits the transportation in interstate commerce of instruments that are "falsely made," covers petitioner's conduct in obtaining automobile certificates of title that contain false mileage information.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Marteney v. *United States*, 216 F.2d 760 (10th Cir. 1954)	5
Martyn v. *United States*, 176 F.2d 609 (8th Cir. 1949)	5
Melvin v. *United States*, 316 F.2d 647 (7th Cir. 1963)	5
McElroy v. *United States*, 455 U.S. 642 (1982)	4, 5
United States v. *Cotoia*, 785 F.2d 497 (4th Cir. 1986)	6
United States v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984)	4, 6
United States v. *Huntley*, 535 F.2d 1400 (5th Cir. 1976), cert. denied, 430 U.S. 929 (1977)	6
United States v. *Kauffman*, 670 F. Supp. 134 (M.D. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir. 1985)	6
United States v. *Massa*, 740 F.2d 629 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985)	6
United States v. *Mitchell*, 588 F.2d 481 (5th Cir.), cert. denied, 442 U.S. 940 (1979)	6
United States v. *Sparrow*, 635 F.2d 794 (10th Cir. 1980), cert. denied, 450 U.S. 1004 (1981)	3, 5
United States v. *Tucker*, 473 F.2d 1290 (6th Cir.), cert. denied, 412 U.S. 942 (1973)	6

Cases – Continued: Page

United States v. *Tyson*, 690 F.2d 9 (1st Cir. 1982) 6

Statutes:

18 U.S.C. 371 2
18 U.S.C. 513 ..... 2, 3, 4
18 U.S.C. 2311 ..... 3, 4
18 U.S.C. 2314 ..... 2, 3, 4, 5, 6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 888 F.2d 283.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on October 18, 1989. The petition for a writ of certiorari was filed on December 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on two counts of interstate transportation of falsely

made securities, 18 U.S.C. 2314, two counts of uttering counterfeit state securities, 18 U.S.C. 513, and conspiracy to violate those statutes, 18 U.S.C. 371.[1] He was sentenced to: six months' imprisonment on the conspiracy count and concurrent terms of two years' imprisonment on the remaining counts, but those concurrent sentences were suspended. Petitioner also was placed on three years' probation and required to perform 100 hours of community service. The court of appeals affirmed. Pet. App. 3a-8a. [2]

1. The evidence at trial showed that between December 1984 and July 1985 petitioner conspired with co-defendants Alvin Davis, Jr., and Dennis Smith, as well as co-conspirators Curman "Buddy" Dickens and Judy Dickens to obtain "washed" Virginia certificates of title that bore false, low-mileage figures. Petitioner was the office manager for co-defendant Davis, who owned a wholesale auto dealership in Manheim, Pennsylvania. Pet. App. 5a. Smith and "Buddy" Dickens owned and operated Buddy's Auto Sales, a wholesale auto dealership in Virginia. Persons at Davis's dealership regularly sent packages of automobile certificates of title to Buddy's Auto Sales. Dickens and his wife then applied for Virginia title certificates for those cars in the name of their dealership. The mileage figures on the old titles had already been altered when the titles were sent from Davis's dealership. *Ibid.* After obtaining the new titles, Dickens and Smith sent them to Davis in Pennsylvania. Dickens and Smith charged a fee of $100 per title. Davis

[1] Co-defendants Alvin Davis, Jr., and Dennis Smith were tried and convicted with petitioner. The court of appeals affirmed their convictions in the same opinion that disposed of petitioner's claims.

[2] The judges on the Third Circuit recused themselves from hearing this case. As a result, the Chief Justice appointed three judges from the Second Circuit to sit by designation in the Third Circuit. See Pet. App. 5a.

then distributed the "washed" titles to area dealers who had provided the original titles to him. Davis charged those dealers a fee for his title "washing" service. Ultimately, the dealers sold the vehicles with rolled-back odometers and washed titles to unsuspecting customers. *Id.* at 6a.

2. Petitioner argued at trial that the prohibition in 18 U.S.C. 2314 against transporting a "falsely made" security applies only to documents that are not themselves genuine – *i.e.*, documents that are not what they purport to be.[3] He conceded that the washed titles might have contained false information, but he argued that because the titles themselves were issued by the appropriate Virginia officials, he could not be convicted under Section 2314. The trial court rejected that claim, and petitioner was found guilty.

3. The court of appeals affirmed. Pet. App. 3a-8a. The court of appeals noted that the Tenth Circuit had held that the term "falsely made" relates to the genuineness of the document, not the falsity of its contents. See *United States* v. *Sparrow*, 635 F.2d 794 (10th Cir. 1980) (en banc), cert. denied, 450 U.S. 1004 (1981). The court held, however, that more recent cases holding to the contrary were better reasoned because important information on a title certificate, such as mileage, is a material part of the certificate. Accordingly, in order to prevent fraudulent documents from being introduced into interstate commerce, the court joined the majority view on the meaning of the term "falsely made" in 18 U.S.C. 2314. Pet. App. 7a.[4]

[3] Section 2314 provides, in pertinent part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; * * * [shall be guilty of a crime].

[4] The court also rejected petitioner's attack on his Section 513 conviction. Petitioner argued that the titles here did not meet the statutory

ARGUMENT

Petitioner contends (Pet. 3-5) that Section 2314 does not reach his conduct because the term "falsely made" in Section 2314 does not apply to documents that contain false information if such documents are genuinely executed and otherwise valid. The court of appeals correctly rejected that argument. Nevertheless, although the issue is not one of surpassing importance, it has arisen from time to time and has closely divided the nine circuits that have addressed it. Because it would be useful to have that circuit split resolved, we do not oppose the petition for a writ of certiorari.

1. Section 2314 applies to instruments that are "falsely made, forged, altered, or counterfeited."[5] By its plain terms, therefore, the statute reaches the false certificates of title in this case. Those titles were "falsely made" because petitioner and his co-conspirators provided Virginia officials with false information before they issued the certificates. The false information was then incorporated into the certificates of title. This plain-meaning interpretation of the statute is wholly consistent with the "broad purpose" of Section 2314 to prevent fraud. *McElroy* v. *United States*, 455 U.S. 642, 655 (1982). As the Ninth Circuit observed in *United States* v. *Daly*, 716 F.2d 1499, 1509 (1983), cert. dismissed, 465 U.S. 1075 (1984), Congress did not "intend[ ]

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definition of "counterfeited," which is defined as "a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." Relying on its holding that the title certificates were "falsely made" under Section 2314, the court below also held that the Virginia title certificates were "falsely made" within the meaning of Section 513. Pet. App. 7a-8a. Petitioner does not challenge his Section 513 convictions in his petition.

[5] Section 2314 applies to "securities," which are defined to include an "instrument or document or writing evidencing ownership of goods." 18 U.S.C. 2311. Thus, there is no doubt that the certificates of title in this case are "securities."

to exempt clever schemes that induce state participation in the creation of fraudulent documents from the scope of section[ ] 2314."

2. Petitioner does not rely on the language or purpose of Section 2314. Instead, he relies exclusively on the Tenth Circuit's decision in *United States* v. *Sparrow*, *supra*, which also involved a false automobile title certificate. In that case, the defendant misrepresented the true ownership of the car. 635 F.2d at 795. The Tenth Circuit, relying on its earlier decision in *Marteney* v. *United States*, 216 F.2d 760 (1954), held that the term "falsely made" was equivalent to forgery in that it referred to "genuineness of execution not falsity of content." 635 F.2d at 796.[6]

Three other circuits, in cases from some years ago, have indicated that they agree with the view that the phrase "falsely made" does not include documents that contain false information but were genuinely executed. In *Melvin* v. *United States*, 316 F.2d 647 (7th Cir. 1963), the Seventh Circuit vacated a conviction where the defendant created and signed a bogus check. The court concluded that "to establish a violation of § 2314 the falsity must affect the making of the security and not merely misrepresentations of fact contained therein." 316 F.2d at 648. The Eighth Circuit had previously agreed with that position in *Martyn* v. *United States*, 176 F.2d 609 (1949). And the Second Circuit in *United States* v. *Brown*, 246 F.2d 541, 542 (1957), noted in dicta that "[t]he phrase 'falsely made' as used in the statute

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[6] The *Sparrow* court also held that, under Section 2314, the government had to show that the security was forged prior to its transportation in interstate commerce. 635 F.2d at 796. This Court's decision in *McElroy* v. *United States*, *supra*, rejected the interstate-commerce holding of *Sparrow*.

relates to the execution of * * * a security rather than to whether its content be true or false."[7]

In more recent cases, five circuits have disagreed with petitioner's interpretation of the phrase "falsely made" in Section 2314. In addition to the Third Circuit in this case,[8] the Fourth, Fifth, Sixth, and Ninth Circuits have held that Section 2314 reaches instruments that "contain[ ] material false information." *United States* v. *Cotoia*, 785 F.2d 497, 498 (4th Cir. 1986) (validly issued certificates of title were "falsely made" because they contained false odometer readings). See *United States* v. *Daly*, 716 F.2d 1499 (9th Cir. 1983), (certificates of title were "falsely made" where state officials recorded false information on genuine title forms), cert. dismissed, 465 U.S. 1075 (1984); *United States* v. *Mitchell*, 588 F.2d 481, 484 (5th Cir.) (certificate of deposit was "falsely made" where defendant used fictitious date), cert. denied, 442 U.S. 940 (1979); *United States* v. *Huntley*, 535 F.2d 1400, 1402 (5th Cir. 1976) (check was "falsely made" where defendent used spurious name on check), cert. denied, 430 U.S. 929 (1977); *United States* v. *Tucker*, 473 F.2d 1290, 1294 (6th Cir.) (sight draft executed in name of fictitious person was "falsely made"), cert. denied, 412 U.S. 942 (1973).

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[7] Petitioner incorrectly contends (Pet. 5) that *United States* v. *Massa*, 740 F.2d 629 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985), and *United States* v. *Tyson*, 690 F.2d 9 (1st Cir. 1982), support his position. In those cases, the securities were completely valid and truthful. The courts held that Section 2314 does not reach such a valid security simply because the defendant forged an endorsement.

[8] Although the panel that decided this case for the Third Circuit contained no Third Circuit judges, the position adopted by the court is consistent with a prior, unpublished decision of the Third Circuit. See *United States* v. *Kauffman*, 670 F. Supp. 134 (M.D. Pa.), aff'd, 782 F.2d 1032 (3d Cir. 1985) (Table) (affirming a conviction under Section 2314 for obtaining automobile certificates of title that contained false mileage statements).

The issue presented by this case arises often enough that, in view of the sharp split among the circuits, resolution of the question presented here would promote the fair and efficient operation of the federal criminal justice system. Accordingly, we do not oppose this Court's review on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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